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No. 03-65

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED STATES, ex rel., PAT COSTNER, ET AL.,
Petitioners,

v.

URS CONSULTANTS, INC., MORRISON KNUDSEN CORPORATION, MRK INCINERATION, INC. AND VERTAC SITE CONTRACTORS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Eighth Circuit Court of Appeals, which (i) recognized that materiality is an implicit element of a False Claims Act violation; (ii) evaluated, based on the facts before it, whether Respondents' cooperation with the government agency and disclosure of problems with the contract's performance negated the element of intent; and (iii) required Petitioners, with the benefit of five years of discovery, to plead their fraud case with particularity, creates a conflict with decisions of this Court or with the other circuit courts of appeal concerning the False Claims Act.

CORPORATE DISCLOSURE STATEMENT FOR RESPONDENTS URS CONSULTANTS, INC., MORRISON KNUDSON CORPORATION AND VERTAC SITE CONTRACTORS

Pursuant to Supreme Court Rule 29.6, Respondents URS Consultants, Inc. ("URS"), Morrison Knudson Corporation ("MK") and Vertac Site Contractors ("Vertac") respectfully submit their Corporate Disclosure Statements:

URS Corporation is the parent of URS Consultants, Inc., a Delaware Corporation and a wholly-owned subsidiary. No publicly-held company owns 10 percent or more of URS's stock.

MK is an entity wholly owned by Washington Group International, Inc. (Ohio). MK is not a separate corporate entity that is traded on a stock exchange; therefore, no company (other than Washington Group International, Inc. (Ohio)) owns 10 percent or more of the stock of the company.

Vertac is a joint venture between Morrison Knudson Corporation and MRK Incineration, Inc. Each entity owns a one-half interest in Vertac.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1-11) is reported at *United States ex rel. Costner v. United States,* 317 F.3d 883 (8th Cir. 2003).

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion on January 28, 2003 and denied rehearing on April 9, 2003. The Petitioners filed this Petition on July 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

INTRODUCTION

The False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA" or "Act"), imposes liability on any person who presents a false or fraudulent claim for payment, or makes a false statement in support of a claim for payment, to the United States Government. Passed in 1863 as a response to defense contractor fraud during the Civil War, the Act has developed a large body of jurisprudence.

In 1995, Petitioners filed a *qui tam* complaint against Respondent environmental remediation contractors. The United States declined to intervene. Following five years of discovery and two weeks of trial, the District Court, as affirmed by the Eighth Circuit Court of Appeals, found that Petitioners had failed to state a claim under the Act and prove their case in every respect. *United States ex rel. Costner v. United States*, 317 F.3d 883 (8th Cir. 2003) (Pet. App. 1-11). To reach its decision, the Eighth Circuit applied long-standing FCA precedent to the facts before it. The Eighth Circuit's decision does not create new FCA law and it does not contradict cases of this Court or of its sister courts of appeals.

STATEMENT

A. PROCEDURAL HISTORY

This FCA case arises from Respondents' environmental remediation of the Vertac Superfund Site in Jacksonville, Arkansas. From 1948 through 1987, the Vertac Site was home to various chemical, herbicide, and pesticide production facilities. Following abandonment of the Site in 1987, EPA initiated an emergency removal action under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") to dispose of the approximately 28,000 drums of dioxin-contaminated waste remaining on site. Pet. App. 3.

In 1989, the Arkansas Department of Pollution Control and Ecology ("ADPC&E") contracted for the on-site incineration of the chemical waste with MRK Incineration, Inc., which subsequently assigned the contract to Respondent Vertac Site Contractors ("VSC"). Pet. App. 3. During the summer of 1992, ADPC&E recognized that its funds were insufficient to complete incineration of the waste. Consequently, EPA assumed primary responsibility for the performance of the ongoing response action. EPA hired Respondent URS Consultants, Inc. ("URS") as its oversight contractor, and VSC was retained as the subcontractor to continue the incineration. Pet. App. 4.

By the time EPA had taken over the incineration operations in 1993, many of the Petitioners had already filed a number of unsuccessful lawsuits and had instigated multiple investigations by EPA and the State concerning their allegations of wrongdoing at the Site. Undeterred, Petitioners filed this suit in 1995. Petitioners charged that VSC and URS fraudulently induced EPA to continue incineration at the Site, and then submitted to EPA false claims for payment for their remediation work. The United States declined to intervene.

After five years of discovery, the District Court set December 18, 2000 (shortly before the April 2001 trial date), as the deadline for submission of dispositive motions. Respondents filed dispositive motions in advance of that date and, following a December 15, 2000 hearing, the District Court granted Respondents' motions, with one exception. Plaintiff Don Daniel had testified in his deposition that on two specific occasions he had intentionally miscalibrated a monitoring device known as the "PT-125," which measured draft in the kiln for the incinerator. The court determined to

proceed to trial with respect to those two specific dates of alleged tampering.[1]

However, under the rubric of "pattern and practice" evidence, the District Court permitted Petitioners to present evidence at the April 2001 trial relating not just to tampering with the PT-125, but to all of their allegations of wrong-doing at the site. Following the eleven-day trial, the District Court entered judgment for Respondents. Based on detailed findings of fact, Pet. App. 15-33, the District Court found that (i) Respondents had not knowingly submitted a false claim or statement to the Government regarding tampering with the PT-125; (ii) Respondents had not knowingly submitted a false claim or statement to the Government regarding their performance of work at the Vertac Site; and (iii) Petitioners had failed to present any evidence from which knowledge of falsity or intent to submit a false claim may be inferred. Pet. App. 33. The District Court also rejected each and every one of Petitioners' allegations of wrongdoing by Respondents. Pet. App. 15-33.

Petitioners appealed, raising issues concerning the pre-trial motions and limited evidentiary rulings. The District Court's decisions were affirmed by the Eighth Circuit Court of Appeals in all respects. Pet. App. 11.

B. THE EIGHTH CIRCUIT'S DECISION

In affirming the District Court's summary judgment decision dismissing the majority of Petitioners' FCA claims, the Eighth Circuit recognized that for a claim for payment to

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[1] By agreement of the parties, the District Court divided the trial into two phases. In Phase 1, Petitioners had the burden of proving that tampering with the PT-125 occurred on the two dates in question and, if so, whether Respondents had knowledge of the tampering as defined in the FCA. Had Plaintiffs prevailed in Phase 1, the second phase of trial would have involved the issue of whether the tampering events were material.

be false under the statute, the claim must be material in some way to the payment decision. Pet. App. 6-7. The appellate court, however, declined to define the "precise contours of the materiality requirement" because, under any formulation, "[p]laintiffs have failed to produce evidence raising a genuine issue of material fact as to whether the allegedly withheld information was even relevant to the EPA's payment decision." Pet. App. 7.

The Eighth Circuit also reviewed the trial court's inquiry into EPA's knowledge of the operational difficulties at the site, concluding that Respondents' openness with EPA "negated the required scienter" for liability under the Act. Pet. App. 9. "A contractor that is open with the government regarding problems and limitations and engages in a cooperative effort with the government to find a solution lacks the intent required by the Act." Pet. App. 8. Finally, the appellate court affirmed the noncontroversial proposition that fraud must be pled with particularity, and affirmed the District Court's dismissal of Petitioners' claims under Fed. R. Civ. P. 9(b). Pet. App. 9-11.

C. PETITIONERS ATTEMPT TO RELITIGATE FACTS BEFORE THIS COURT

Relators rely on certain factual assertions in support of their petition. Based on the evidence, the District Court rejected each one of these claims, and the Court of Appeals affirmed. Though they might disagree with the lower courts' findings, that disagreement does not form the basis for granting certiorari.

First, Petitioners allege that Respondents concealed facts concerning the Site's operation in order to fraudulently induce EPA to award them the incineration contract in 1993, and then continued to hide the problems, including worker safety issues, to fraudulently procure payment under the

contract. Pet. 9-10. The District Court, as affirmed by the Eighth Circuit, found otherwise:

> EPA participated at the Vertac Site from the inception of the cleanup. EPA had a Remedial Project Manager assigned to the site, as well as a team of engineers, a risk assessment specialist and other scientists. During the period of the State's contract, EPA regularly communicated with the State and had access to the documents concerning the State contract and the performance of the incinerator. EPA also reviewed State reports concerning the site and conducted regular discussions with State personnel about various aspects of the operation.

Pet. App. 17.

The District Court further concluded that much of the information concerning occurrences at the Site came from Respondents' detailed reports to the Government:

> Also following June 8, 1993, URS and VSC provided EPA with multiple reports of the site operations, including: daily reports; weekly reports (which included daily reports, shift engineer reports, unusual incident reports, and photographs); monthly reports; special reports authorized by Work Assignment Forms as to individual aspects of the incineration operations; RCRA compliance audit reports; quality assurance reports; payment reports; fee award reports; and air monitoring reports. URS's shift engineers were present on-site 24 hours per day, and their contemporaneous shift reports were included in the reports to EPA.

Pet. App. 17. Petitioners cannot relitigate these findings before this Court.

The petition focuses much attention on air monitoring data from VSC's on-site monitors that Petitioners claim Respondents hid from EPA. Pet. 10. These "facts," too, were rejected by the courts below. The District Court found that there was no contractual duty to disclose VSC's air monitor-

ing data, but that Respondents nonetheless had notified EPA that the elevated dioxin level readings recorded by the site perimeter monitors were caused by operational upsets at the incinerator:

> At the February 1992 meeting convened by EPA to study the cause of elevated dioxin levels at the site, VSC Project Manager, Bob Apa advised EPA, ADPC&E and the independent consultants that VSC believed four of the five elevated dioxin samples being studied by EPA could be correlated to reported kiln puffs or flame-outs occurring on specific dates.
>
> Unlike the URS perimeter air monitors, there was no requirement that VSC report the results of its onsite monitors.

Pet. App. 30.[2] The District Court also found that EPA was well aware of the air emissions data: "Further, even during the time period when the State of Arkansas had lead responsibility for the incineration, EPA used VSC's operations logs and other site reports to understand and interpret the URS perimeter air monitoring data." Pet. App.

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[2] For its own purposes, VSC maintained air monitors proximate to the incinerator. These monitors were not contractually required. Pet. App. 30. The other monitors, located on the perimeter of the site, to track off-site air impacts, never exceeded EPA's applicable limits during the entire duration of incineration.

> As of June 1993, EPA was aware of the VSC on-site monitoring data. On April 21, 1994, William Luthans, Chief of EPA's Arkansas/Louisiana Enforcement Section wrote to the local newspaper explaining the differences between the VSC monitoring data and the EPA ambient air actions levels. Mr. Luthans explained that because the VSC monitors are located adjacent to the incinerator, they cannot be compared to the EPA ambient air monitoring action levels which are levels established to protect the community beyond the fenceline who may be exposed twenty-four hours a day, seven days a week.

Pet. App. 30.

30. And, "[t]he evidence does not show a deliberate effort on the part of VSC to hide its on-site air monitoring data, or other data." Pet. App. 31.

Finally, the courts below rejected Petitioners' claims that if EPA had been aware of the incinerator's problems, the agency would have ceased payment under the contracts:

> During the performance of the Vertac on-site incineration, EPA was aware of the allegations made by plaintiffs in this lawsuit, including those relating to tampering with the computer monitoring equipment. EPA conducted numerous investigations of these allegations. Despite plaintiffs' allegations and its investigations, EPA continued with the contract and continued to make payment under the contract.

Pet. App. 18.

The District Court's and the Eighth Circuit's findings of fact do not accord with Petitioners' version of the facts. That disagreement does not create an issue for review by this Court.

ARGUMENT

The petition does not present an issue for resolution by this Court. The Eighth Circuit's opinion does not conflict with prior decisions of the Court. Notwithstanding Petitioners' claims, none of the issues resolved by the appellate court are the subject of a conflict among the circuits. The District Court, as affirmed by the Court of Appeals, applied settled FCA principles to the facts before it. Petitioners disagree with the result. Disagreement with a court's application of law to the facts, however, is not an appropriate basis for granting certiorari.

I. THE EIGHTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT AND DOES NOT PRESENT AN ISSUE FOR RESOLUTION BY THE COURT.

Petitioners must demonstrate that the Eighth Circuit decided "an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). To do so, Petitioners incorrectly describe the Eighth Circuit's decision as conflicting with two decisions of this Court: *Neder v. United States,* 527 U.S. 1 (1999) and *United States v. Wells,* 519 U.S. 482 (1997). Neither *Neder* nor *Wells* concerned the False Claims Act. Neither case suggested a re-examination of the long-standing and widely-accepted precedent finding materiality to be an element of False Claims Act liability. Instead, in order to discern Congressional intent with respect to the liability elements of specific criminal statutes, *Neder* and *Wells* examined the historical context giving rise to those statutes' passage. By their very nature, therefore, the outcomes of these cases are limited to the statutes they examine, and they are not inconsistent with the principle that materiality is a component of liability under the False Claims Act. Even if their reach were broadened to the False Claims Act, then application of the *Neder* and *Wells* framework demonstrates Congress' intent to retain materiality as an element of the False Claims Act.

A. The Eighth Circuit's Decision Is Not In Conflict With Decisions Of This Court.

The Eighth Circuit begins by explaining that its previous decisions had not explicitly considered the question of whether a materiality element is inherent in the False Claims Act. Pet. App. 6. Instead, its earlier opinions recognized that a showing of materiality was necessary to prevail on a claim under the Act, and centered discussion on the application of the materiality standard to each of the individual cases. Pet. App. 6-7. Accepting the conclusion that materiality is an

implicit part of a claim under the statute, the appellate court concluded below that it need not decide the issue of how to define the parameters of the materiality standard:

> We need not decide the precise contours of the materiality requirement, however, because we hold that the plaintiffs have failed to produce evidence raising a genuine issue of material fact as to whether the allegedly withheld information was even relevant to the EPA's payment decision.

Pet. App. 7.

Petitioners argue that this language somehow creates a conflict with this Court's decisions in *Neder* and *Wells*. Petitioners' argument misreads both cases.

1. Neder *and* Wells *do not conflict with the conclusion that materiality is an element of False Claims Act liability.*

In 1999, this Court unanimously held that materiality is an element of the federal mail fraud, wire fraud, and bank fraud statutes. *Neder,* 527 U.S. at 20-25. To reach that conclusion, the Court employed the framework set forth in *Wells,* 519 U.S. 482. To the extent a statute's language does not expressly enumerate materiality as an element, a court must turn to a "necessary second step:" the context and history of the legislation. *Neder*, 527 U.S. at 21. "It is a well-established rule of construction that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of these terms.' " *Id.* at 21 (citations omitted).

Neder describes the context of the 1872 passage of the original mail fraud statute as one in which the "common law could not have conceived of 'fraud' without proof of materiality." *Id.* at 22. The Court recognized materiality in the mail fraud statute based on (i) the common law notion

that fraud encompasses materiality and (ii) the absence of an expression of Congressional intent to the contrary. *Id.* at 23.

Wells examines the 1948 passage of 18 U.S.C. § 1014, which criminalized a knowing false statement to a federally insured bank. Congress passed Section 1014 as part of recodification of the criminal code. Congress retained in some sections of the new code an express requirement for materiality, did not change other sections that were silent on the issue, and omitted materiality from passages where it had previously been present. *Wells,* 519 U.S. at 492-93. Viewed against this backdrop, the Court concluded that Congress intended the absence of materiality from Section 1014. *Id.* at 494-95. The issue in *Wells* arose from a far different context than that which existed at the time of the mail fraud statute, and its contemporary, the False Claims Act. The Court's opinion in *Wells,* therefore, does not preclude the Eighth Circuit's decision in *Costner.*

2. *Application of the* Wells *and* Neder *framework to the False Claims Act does not yield the conclusion that materiality is not an element of the Act.*

Application of the framework employed in *Wells* and *Neder* to the False Claims Act yields the conclusion that materiality is properly an element of liability under the statute. Like the mail fraud statute examined in *Neder*, the False Claims Act does not use the word "material." Instead, the four main liability provisions under the Act impose liability on a person who:

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim *for payment or approval*;

> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim *paid or approved by the Government*;
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim *allowed or paid*; . . .
>
> (7) knowingly makes, uses or causes to be made or used, a false record or statement to *conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government* . . . .

31 U.S.C. § 3729(a) (emphasis added). The absence of the word material, however, does not end the inquiry. Under *Neder* and *Wells*, the next step is an examination of the context, and then the legislative history of the statute.

Here, the False Claim Act's provisions contemplate a materiality component because they establish a scheme by which liability is only imposed when the misconduct or misstatements bear upon the claimant's entitlement to payment—that is the very purpose of the statute. In other words, a claim for payment cannot be "false" if it would have been paid or approved notwithstanding the alleged misconduct or misstatement. A "false statement" cannot be used to "get" a claim paid or approved by the Government unless it is relevant to the Government's payment decision.

Further, Petitioners concede that "fraud" connotes materiality: "Both [the *Wells* and *Neder*] decisions were very clear in their analyses and holdings to the effect that federal statutes that impose liability for making false statements, as distinguished from making fraudulent statements or engaging in fraudulent conduct, do not contain by implication any materiality requirement." Pet. 19. This admission is fatal to Petitioners. There is absolutely no basis on which to read the statute's language to require materiality for a fraudulent claim, but to dispense with the requirement for a false claim. Thus, the language and structure of the False Claims

Act leads to the conclusion that materiality is an element of liability.

The history and context of the statute's passage and subsequent amendments reinforce the conclusion. Enacted in 1863, the False Claims Act is a contemporary of the mail fraud statute which the Court in *Neder* characterized as coming at a time when "the common law could not have conceived of 'fraud' without proof of materiality." *Neder*, 527 U.S. at 22. The Act was passed in reaction to "[a] series of sensational congressional investigations into the sale of provisions and munitions to the War Department" during the Civil War, which uncovered numerous instances in which the Government had been billed for "[n]onexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop this plundering of the public treasury." *United States v. McNinch*, 356 U.S. 595, 599 (1958). Thus, the Act's very purpose was to police false claims of entitlement to public money, and the "false" statement causing the payment of public money—not inconsequential false statements, mistakes, or misstatements. *See United States v. Bornstein,* 423 U.S. 303, 314 (1976), *quoting United States ex rel. Marcus v. Hess,* 317 U.S. 537, 551-52 (1943) ("We think the chief purpose of the [Act's civil penalties] was to provide restitution to the government of money taken from it by fraud . . ."). *See also* S. Rep. No. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 ("The purpose of S. 1562, the False Claims Reform Act, is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government.").

The subsequent legislative history confirms the tie between the materiality of the false statement or claim and the entitlement to payment. The 1986 amendments to the False Claims Act codified the "reverse" false claims provision. In adding this provision (31 U.S.C. § 3729(a)(7)), Congress

recognized that the false statement giving rise to liability under the statute must be material, and equated a material representation aimed at avoiding the payment of money to the Government to a false claim to receive payment from the Government:

> Section 1, paragraph (7) of the bill amends section 3729 to provide that an individual who makes a material representation to avoid paying money owed the Government would be equally liable under the Act as if he had submitted a false claim to receive money.

S. Rep. No. 99-345, at 18, *reprinted in* 1986 U.S.C.C.A.N. at 5283.

Finally, given the number of cases that have recognized materiality to be a component of False Claims Act liability, *see* Section II *infra,* Congress could have amended the statute to disavow the element of materiality. It has not done so, thus evidencing its intent to retain materiality as an element of liability under the statute. *See, e.g., Equal Employment Opportunity Comm'n v. Arabian American Oil Co.,* 499 U.S. 244, 258 (1991) ("Congress, should it wish to do so, may similarly amend Title VII and in so doing will be able to calibrate its provisions in a way we cannot").

B. The Eighth Circuit's Decision Is In Accord With Long-Standing False Claims Act Jurisprudence And Does Not Create New Law.

The Eighth Circuit's decision does not affect False Claims Act jurisprudence. As set forth in Section II below, it is consistent with other Eighth Circuit and appellate precedent finding materiality to be an inherent part of the statute. The Eighth Circuit specifically reserved definition of the materiality standard for another day, finding that regardless of what measure of materiality was applied Petitioners had not raised any facts that could support their case. Pet. App. 7. This conclusion is dependent on the facts in the record in this

case, Pet. App. 7, making it of limited application to other FCA cases.

Because the decision below does not create new law and does not present a conflict with this Court's decisions, the petition for certiorari should be denied.

II. THE EIGHTH CIRCUIT'S DECISION ON MATERIALITY DOES NOT CONFLICT WITH OTHER CIRCUITS.

Petitioners argue that the "courts of appeals are also split and considerably uncertain . . . regarding the existence of . . . any materiality requirement." Pet. 27. Petitioners, however, fail to identify the requisite disagreement among appellate courts. The decision at issue followed Eighth Circuit precedent when it held that "the [False Claims] Act provides recovery from one 'who makes a *material* misrepresentation to avoid paying some obligation owed to the government.' " Pet. App. 6, *quoting United States v. Q Int'l Courier, Inc.*, 131 F.3d 770, 772 (8th Cir. 1997) (emphasis added); *see also Rabushka ex rel. United States v. Crane Co.*, 122 F.3d 559, 563 (8th Cir. 1997). The Eighth Circuit holding is also consistent with the law in other circuits. Each circuit that has decided this issue has agreed that materiality is an essential element under the civil False Claims Act. Thus, there is no split in the Circuits for this Court to resolve.

In their attempt to manufacture a circuit split, Petitioners misconstrue the Fifth Circuit's holding in *United States v. Southland Management Corporation,* 288 F.3d 665 (5th Cir. 2002), *vacated and decided on other grounds,* 326 F.3d 669 (5th Cir. 2003) (en banc) and the Third Circuit's holding in *United States ex rel. Cantekin v. University of Pittsburgh,* 192 F.3d 402 (3d Cir. 1999). Contrary to Petitioners' argument, Pet. 15, those two cases do not create a circuit split, nor do they support Petitioners' assertion that recent

Supreme Court decisions "likely preclude" the FCA's materiality requirement.

A. There Is No Conflict In The Circuits.

The appellate courts addressing the issue have held that materiality is an indispensable element of a civil False Claims Act case. Most circuit courts—including the First, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits and the Court of Federal Claims—have either explicitly or implicitly required materiality. *See, e.g., United States v. Data Translation, Inc.*, 984 F.2d 1256, 1267 (1st Cir. 1992) (holding that false statement that was not material did not give rise to FCA liability); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785, 788 (4th Cir. 1999) (FCA liability subject to requirement that the false statement or claim be material); *United States ex rel. Berge v. Board of Trustees of the Univ. of Alabama*, 104 F.3d 1453, 1459 (4th Cir. 1997) ("we now make explicit that the current civil False Claims Act imposes a materiality requirement"); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997) ("the FCA interdicts material misrepresentations made to qualify for government privileges or services" (internal quotation and citation omitted)); *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 732-33 (7th Cir. 1999) (dismissing FCA claim because plaintiff did not show false statement "was material to the United States' buying decision"); *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1019 (7th Cir. 1999) (agreeing with Fourth Circuit's FCA materiality requirement and dismissing FCA suit because alleged misrepresentations were found to be immaterial to government funding); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266-67 (9th Cir. 1996) (finding that false compliance certifications create FCA liability only when certification is a prerequisite to a government benefit); *United States ex rel. Butler v. Hughes Helicopter & McDonnell Douglas*, CV 89-760, 1993 WL

841192, at *15 & n.5 (C.D. Cal. Aug. 25, 1993) (Ninth Circuit has implied that false statements must be material under the FCA) (unpublished decision), *aff'd*, 71 F.3d 321 (9th Cir. 1995); *Tyger Construction Co. v. United States,* 28 Fed. Cl. 35, 55 (Fed. Cl. 1993) ("the FCA covers only those false statements that are material").[3]

Further, since the Supreme Court's 1997 decision in *Wells*, many courts have determined that materiality is an element of a FCA violation. The case law cited above includes multiple district court and appellate court decisions that have reaffirmed that materiality is an essential element of the False Claims Act since *Wells* was decided in 1997. Thus, Petitioners' criticism of the long standing precedent in the circuits is unpersuasive.[4]

B. *Southland* And *Cantekin* Do Not Create A "Split" In The Circuits.

Petitioners cite two cases—*United States v. Southland Management Corporation,* 288 F.3d 665 (5th Cir. 2002), *vacated and decided on other grounds,* 326 F.3d 669 (5th Cir.

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[3] Although the Courts of Appeals for the Third and Eleventh Circuits have not had the opportunity to reach the issue, at least one district court within each of those circuits has affirmed the materiality requirement. *See, e.g., United States v. Klein*, 230 F. Supp. 426, 432 (W.D. Pa. 1964) ("[f]raud implies a misrepresentation of a material fact"), *aff'd*, 356 F.2d 983 (3d Cir. 1966); *United States v. Hill,* 676 F. Supp. 1158, 1176 n.25 (N.D. Fla. 1987) (government must show that "but for" the false statement it would not have issued guaranteed loan application).

[4] Respondents have identified a single district court decision holding that materiality is not required under the civil FCA. Pet. 16, *citing United States ex rel. Roby v. Boeing Co.,* 184 F.R.D. 107, 112 (S.D. Ohio 1998) (holding without explanation that under *Wells* materiality was not required for the FCA). However, *Roby* has since been explicitly rejected by at least two other courts. *See United States ex rel. Wilkins v. N. Am. Constr. Corp.*, 173 F. Supp. 2d 601, 622, 623-30 (S.D. Tex. 2001); *United States v. Southland Mgmt. Corp.*, 95 F. Supp. 2d 629, 636-37 (S.D. Miss. 2000).

2003) (en banc) and *United States ex rel. Cantekin v. University of Pittsburgh,* 192 F.3d 402 (3d Cir. 1999)—as evidence that there is a "split in the courts of appeals." Pet. 24. Petitioners' reliance on these cases is misguided for two reasons. First, neither case actually held that materiality was not an element. In fact, both cases declined to rule on whether materiality is an element of the FCA because materiality was not at issue in the case. Second, the language cited by Petitioners is not authoritative—one decision was vacated, *Southland,* 326 F.3d 669 (en banc), and the other decision discussed the issue of materiality in dicta, *Cantekin*, 192 F.3d at 415-16. These cases simply do not offer this Court a "compelling reason" for granting certiorari.

Petitioners misconstrue the language and holding in the Fifth Circuit's 2002 decision in *Southland* ("*Southland I*"). The Fifth Circuit's 2002 opinion acknowledges that "many courts, including this court, have found that there is a fourth, 'materiality' element required to maintain a cause of action under the [False Claims] Act." *Southland I,* 288 F.3d at 675, 676 ("this court has indicated that the Act contains a materiality element"). The court noted that it did not reach the question of whether materiality was an element of the FCA and stated that the Fifth Circuit may in the future take the opportunity to assess whether the Supreme Court's decisions in *Wells* and *Neder* "*might* undermine our precedents interpreting the civil FCA to contain an implicit materiality requirement." *Id.* at 701, n.15 (emphasis added). Despite this footnote, the Fifth Circuit upheld the district court's decision that the civil False Claims Act contains a materiality requirement, noting that "not all statutory, regulatory, or contractual violations necessarily give rise to liability under the FCA." *Id.* at 680.

More important, the panel's 2002 decision was *vacated* by an order for rehearing en banc and was affirmed on other grounds in a 2003 en banc decision, *United States v.*

Southland Management Corp., 326 F.3d 669 (5th Cir. 2003) ("*Southland II*"). The Fifth Circuit 2003 en banc majority decision does not reach the issue of materiality. *See Southland II*, 326 F.3d at 671, 675, 677 (ruling that the defendants were entitled to the housing assistance payments they sought from the government; therefore their claims were not false as a matter of law).[5] Petitioners' desperate attempt to create an issue worthy of this Court's review by relying on a footnote in a vacated opinion must fail.[6] *Southland II*, therefore, does not create a split in the circuits.

Petitioners also make much ado over what they concede is dicta in the Third Circuit's opinion in *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402 (3d Cir. 1999). Pet. 17. In *Cantekin*, the Third Circuit considered whether the 1986 amendments to the FCA should be applied retroactively to various grant applications that the defendant researcher submitted to the National Institute of Health. *Cantekin*, 192 F.3d at 404. In considering whether a claim submitted after October 1986 was false, the Third Circuit acknowledged that existing case law required materiality: "[c]ourts have held that claims under the False Claims Act are subject to a judicially-imposed materiality requirement." *Id.* at 415. The Court states, in *dicta*, that "*perhaps* [the Supreme Court's decision in] *Neder argues against* a materiality requirement." *Id.* (emphasis added). However, the Third Circuit stated it "need not decide whether there is a materiality requirement under the False Claims Act, because even if

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[5] The concurring opinion in *Southland II* affirmed the role of materiality in the FCA, and noted that the Government had conceded the issue. *Southland II*, 326 F.3d at 679 (Jones, J., concurring).

[6] Opinions that are vacated "are officially gone. They have no legal effect whatever. They are void. None of the statements made in . . . them has any remaining force and cannot be considered to express the view of this Court." *United States v. Sigma Int'l Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002).

there is, we think it is clear that Bluestone's failure to disclose his industry funding would readily qualify as material." *Id.* Such dictum has "no binding or precedential impact" and is inadequate to grant certiorari on this question. *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1472 (9th Cir. 1995); *Richardson v. Ramirez*, 418 U.S. 24, 83 n.27 (1974).

III. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OVER WHETHER GOVERNMENT KNOWLEDGE MAY SERVE AS A DEFENSE TO INTENT IN A FALSE CLAIMS ACT CASE.

Apparently recognizing that the decision below provides a second, independent ground to affirm the trial court, Petitioners argue that this Court should grant certiorari to review the FCA's scienter requirement. Petitioners maintain that "the courts of appeals are split on the relevance of government knowledge as a defense, particularly in light of the 1986 amendments to the [False Claims] Act which explicitly removed the government knowledge defense." Pet. 23. Petitioners therefore seek review in this Court as to whether the Eighth Circuit "applied an incorrect legal standard" when it decided that Respondents' disclosure "negated . . . the required intent or scienter" necessary to support a claim under the False Claims Act. Pet. i; *see also* Pet. App. 8-9.

The truth, however, is that, once again, there is no conflict for this Court to resolve. Those circuit courts that have considered whether the government's knowledge of a contractor's actions may serve as a defense to a False Claims Act case agree with two basic propositions. First, the 1986 amendments to the False Claims Act merely eliminated government knowledge as an *automatic bar* to an action; they did not abolish the government knowledge defense. Second, courts agree that the government's knowledge of the facts

underlying a claim is relevant to and can negate a contractor's intent to present a false claim. Accordingly, the uniform practice among these courts is to evaluate the effect of government knowledge on a case-by-case basis. The Eighth Circuit acted in harmony with these decisions when it held that Petitioners could not establish the necessary intent to sustain their claims.

A. The 1986 Amendments To The False Claims Act Did Not Abolish The Government Knowledge Defense.

Before the 1986 amendments to the False Claims Act, government knowledge of a contractor's actions was an absolute bar to a *qui tam* action:

> Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

31 U.S.C. § 3730(b)(4) (1982). The 1986 amendments to the False Claims Act eliminated this language, and replaced it with language outlining the procedure under which the government must decide to assume an action, or leave it for a private *qui tam* relator. *See* 31 U.S.C. § 3730(b)(4) (1986).

Courts recognize, however, that the 1986 amendments did not eliminate the government knowledge defense in all cases. The Ninth Circuit observed: "[t]he 1986 amendments eliminated this language, however, *leaving open* what would be the effect of government knowledge of the facts underlying a suit." *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 326 (9th Cir. 1995) (emphasis added). The Tenth Circuit likewise agrees that while the government knowledge defense is "no longer an automatic defense to an FCA . . . there may still be occasions when the government's knowledge of or cooperation with a contrac-

tor's actions is so extensive that the contractor could not as a matter of law possess the requisite state of mind to be liable under the FCA." *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir. 2000). In addition, the fact that courts continue to recognize and apply government knowledge as a defense to intent, *see* Section III.B *infra*, demonstrates that there is a consensus that the defense remains intact. On the other hand, Respondents are aware of no case in which a court has held that the 1986 amendments to the False Claims Act eliminated the government knowledge defense entirely.

B. The Circuit Courts Uniformly Recognize That Government Knowledge May Serve As A Defense To Intent In A False Claims Act Case.

Despite Petitioners' claim, courts are not confused as to the relevance of government knowledge as a defense to intent in a False Claims Act case. Instead, the circuit courts uniformly hold that government knowledge is both relevant to the question of intent and can "negate" intent if the government's knowledge is sufficiently great to preclude the possibility of the contractor making false statements. *See United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 289 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 1929 (2003) (joining four circuit courts in holding that "the government's knowledge of the facts underlying an allegedly false record or statement can negate the scienter required for an FCA violation"); *Shaw*, 213 F.3d at 534 (after reviewing case law, court "assum[es] some level of government knowledge would negate the intent requirement under the FCA"); *United States ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 545 (7th Cir. 1999) (in case where government knows and approves particulars of a claim before claim for payment is presented, "the government's knowledge effectively negates the fraud or falsity required by the FCA"); *Butler*, 71 F.3d at 327-29 (holding that cooperation and sharing of information between

contractor and Army negated intent required under False Claims Act); *United States ex rel. Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157 (2d Cir.) ("the fact that a contractor has fully disclosed all information to the government may show that the contractor has not 'knowingly' submitted a false claim"), *cert. denied*, 508 U.S. 973 (1993); *see also Southland Mgmt. Corp.*, 326 F.3d at 681-84 (en banc) (concurring opinion) (concluding that result in defendants' favor was correct because government knew project's essential condition, and therefore defendants did not "knowingly" present false claim).

There is no conflict presented for this Court's resolution because these holdings are uniform. The Eighth Circuit's decision in this case joins that uniformity by relying on these same authorities in affirming the trial court's decision that "the defendants' openness with the EPA about their problems and their close working relationship in solving the problems negated the required scienter regarding these issues." Pet. App. 9.

Moreover, the primary case relied on by Petitioners as evidence of a "split" among the circuit courts, *see* Pet. 23, is *in accord* with the cases cited above. *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991), states that "knowledge possessed by officials of the United States . . . may show that the defendant did not submit its claim in deliberate ignorance or reckless disregard of the truth." *Id.* at 1421. The Ninth Circuit later recognized that "*Hagood* left open the possibility that . . . the extent and nature of government knowledge may show that the defendant did not 'knowingly' submit a false claim and so did not have the intent required by the post-1986 FCA." *Butler*, 71 F.3d at 327. That is precisely what the Eighth Circuit decided when it agreed that "if the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have

knowingly presented a fraudulent or false claim." Pet. App. 8, *quoting Becker*, 305 F.3d at 289. Therefore, the very authority cited by Petitioners as a basis for a conflict among the circuit courts supports the uniform approach taken by numerous circuit courts, including the Eighth Circuit in this case. Given this agreement on the legal significance of government knowledge to the question of intent, there simply is no reason to grant certiorari on this question.

C. The Eighth Circuit's Decision Is Consistent With All The Other Circuit Courts That Also Address the Government Knowledge Defense As A Factual Inquiry Into The Information Provided To The Government.

The agreement shared among these courts with respect to the effect of government knowledge on intent is not limited to legal principle. Rather, courts agree that the question is largely one of fact, and therefore is to be treated on a case by case basis. *See Butler*, 71 F.3d at 326 (recognizing that after the 1986 amendments to the FCA, "courts have had to decide case by case whether a FCA claim based on information in the government's possession can succeed"). Accordingly, like the courts below, these courts have engaged in detailed scrutiny of the underlying factual records in order to conclude the level of cooperation between the government and the defendant contractor, and the amount of information provided to the government, was so extensive as to negate the possibility that the contractor could lie to the government. *See Southland Mgmt. Corp.*, 326 F.3d at 683-84 (concurring opinion) (concluding that contractor did not knowingly submit false claims because evidence showed it was in constant contact with government regarding repairs that needed to be made to public housing facilities); *Durcholz*, 189 F.3d 544-45 (holding that contractor did not knowingly submit false claims where evidence showed that contractor was following government's explicit directions regarding

manner in which claims were to be presented); *Butler*, 71 F.3d at 327-28 (holding that defendant could not have knowingly submitted false claims where evidence showed that tests at issue in complaint were the subject of discussion between defendant and Army, and that Army knew of and approved testing method actually used); *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992) (holding that defendant did not act with requisite intent because evidence showed that government had extensive knowledge of all engineering deficiencies identified by *qui tam* relator, and defendant had ongoing dialogue with government about problems); *cf. Shaw*, 213 F.3d at 534 (concluding that government knowledge defense was not established because evidence showed that (i) relator, not defendant, told the government about certain failures, and (ii) defendant was not forthcoming and repeatedly evaded government questioning).

Again, there is no conflict to resolve because the Eighth Circuit proceeded in the same manner in this case. It first recognized the legal principal that "[a] contractor that is open with the government regarding problems and limitations and engages in a cooperative effort with the government to find a solution lacks the intent required under the [False Claims] Act." Pet. App. 8, *citing Butler*, 71 F.3d at 327, and *Wang*, 975 F.2d at 1421. The court then went on to closely examine the record, from which it determined that (i) air monitoring data was available to EPA, (ii) EPA knew of ongoing problems with kiln puffs and kiln leaks "from the beginning," (iii) EPA was aware that rod ports on the incinerator were occasionally opened for maintenance, and that no evidence existed showing that they were opened for an improper purpose, and (iv) defendants openly discussed problems leading to certain OSHA violations. Pet. App. 8-9. Based on its close review of the record, the Eighth Circuit concluded that "[a]lthough the record indicates that the defendants' performance under the contract was not perfect, *the extent of*

the government's knowledge through its on-site personnel and other sources shows that, as in Durcholz, the 'government knew what it wanted, and it got what it paid for.'" Pet. App. 9, *quoting Durcholz*, 198 F.3d at 545 (emphasis added). For these reasons, the Eighth Circuit affirmed the district court's "finding that the defendants' openness with the EPA about their problems and their close working relationship in solving the problems negated the required scienter regarding these issues." Pet. App. 9. The Eighth Circuit's analysis is in complete harmony with the legal principles and procedures adopted by the other circuit courts that have considered and applied the government knowledge defense to the question of intent. Given the Eighth Circuit's uniform approach to this issue, there is no conflict over which this Court should grant certiorari.

II. THE EIGHTH CIRCUIT'S DECISION ON RULE 9(B) DOES NOT CREATE AN ISSUE WORTHY OF REVIEW BY THIS COURT.

There can be no dispute that Rule 9(b) of the Federal Rules of Civil Procedure is applicable to FCA litigation, and is applicable to *qui tam* relaters. Petitioners nonetheless urge review because in their view the Eighth Circuit imposed a particularity requirement at odds with the Fourth Circuit's opinion in *Harrison v. Westinghouse Savannah River Company*, 176 F.3d 776 (4th Cir. 1999). Pet. 26. In *Harrison*, the Fourth Circuit stated that the court must be "satisfied (1) that the defendant has been made aware of the particular circumstances for which he will have to prepare a defense at trial and (2) that plaintiff has substantial pre-discovery evidence of those facts." *Harrison*, 176 F.3d at 784. The Fourth Circuit actually dismissed Counts 4, 7 and 8 of the Complaint in *Harrison* because the Plaintiff failed adequately to plead the underlying fraud. *Id.* at 789.

Thus, contrary to Petitioners' argument, the Fourth and Eighth Circuits are in agreement that specificity as to the underlying fraudulent conduct is required when that information is necessary to prepare a defense. The remaining Courts of Appeal that have addressed this issue also are in agreement. *See United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051-52 (9th Cir. 2001) (complaint that alleged fraud due to tampering with tests was insufficient because Plaintiffs failed to specify the types of tests implicated, the identity of the employees who performed the tests, and the dates, times and places where the tests were conducted); *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 552 (D.C. Cir. 2002) (detailed description of the specific falsehoods that are the basis of the claim are required); *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995) (specific statements or conduct giving rise to the fraud claim are required); *United States ex rel. Willard v. Humana Health Plan of Texas, Inc.*, No. 02-40285, 2003 WL 21467963, at *8 (5th Cir. June 26, 2003) (circumstances constituting fraud or mistake required); *Bly-Magee v. California,* 236 F.3d 1014, 1019 (9th Cir. 2001) (notice of the particular misconduct which is alleged is required); *United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1308-09 (11th Cir. 2002) (making clear that Rule 9(b) does apply to actions under the False Claims Act).

Notwithstanding the consistent authority to the contrary, Petitioners urge review by this Court because they believe that the District Court and the Eighth Circuit improperly required them to specify the details of the underlying fraudulent conduct. Significantly, the courts below imposed the particularity requirement not on the admittedly inadequate allegations in the complaint, but rather on the disclosures in discovery. The trial court required disclosure of the particular details of the claim after five years of litigation and only four months prior to trial. The Eighth Circuit explained the

rationale for its requirement: "[w]ithout information as to who tampered with the monitors and how and when the tampering occurred, the defendants would be largely unable to respond with contemporaneous witnesses and documents and expert witnesses to testify as to whether the monitoring data is consistent with the tampering of the sort alleged to have occurred." Pet. App. 11. This is textbook law.

As to the underlying fraudulent conduct that Petitioners subsequently identified in discovery (*i.e.*, the two dates of alleged tampering that were disclosed and litigated), the District Court found that "Daniel's different versions of the tampering were contradicted by all of the other witnesses and by the contemporaneous site records and historian data" and the District Court "had no hesitancy in completely discrediting [Daniel's] testimony." Pet. App. 13. Such a specific finding by the trial court does not provide a basis for a petition for certiorari.

CONCLUSION

For the reasons set forth above, Respondents respectfully request the Court to deny the petition for certiorari.

Respectfully submitted,

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